

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR
RELATIONS BOARD

AND

CASE NO. ULP-4668

STATE OF RHODE ISLAND
OFFICE OF THE SECRETARY OF STATE

DECISION
AND
ORDER

The above-entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter Board) on an Unfair Labor Practice Complaint (hereinafter Complaint) issued by the Board against the State of Rhode Island, Office of The Secretary of State (hereinafter Respondent) based upon an Unfair Labor Practice Charge (hereinafter Charge) filed with the Board on January 20, 1993, by Rhode Island Laborers' District Council on behalf of Local Union 1033, LIUNA, AFL-CIO (hereinafter Union). The Charge, as validly amended at an Informal Hearing on February 9, 1993, alleged that the Respondent, through its Agents, in separating Darcy Viner from her employment at the Office of The Secretary of State on January 5, 1993, in retribution and retaliation of Darcy Viner's action of exercising statutory rights afforded her by R.I.G.L. 28-7-12 and 36-11 constituted violations of R.I.G.L. 28-7-13 (1 (2), (3 (4), (5), (8), (9) and (10).

R.I.G.L. 28-7-12 provides that:

"Rights of employees. -- Employees shall have the right of self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion from any source; but nothing contained in this chapter shall be interpreted to prohibit employees and employers from conferring with each other at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section".

R.I.G.L. 36-11-2, in pertinent part, provides that

"There shall be no discrimination against any state employee

because such employee has formed, joined or chosen to be represented by any labor organization or employee organization...".

R.I.G.L. 28-7-13 (1) provides:

"1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by § 28-7-12".

R.I.G.L. 28-7-13 (2) provides:

"2. To prepare, maintain, distribute or circulate any black list of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise of such individuals of any of the rights guaranteed by § 28-7-12".

R.I.G.L. 28-7-13 (3) provides:

"3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or any thing else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay".

R.I.G.L. 28-7-13 (4) provides:

"4. To require an employee or one seeking employment as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing".

R.I.G.L. 28-7-13 (5) provides:

"5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment; provided that nothing in this chapter shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in, §§ 28-7-14 - 28-7-19, inclusive".

R.I.G.L. 28-7-13 (8) provides:

"8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this chapter".

R.I.G.L. 28-7-13 (9) provides:

Following the filing of the Charge, the Board, in writing, notified the Respondent and the Union that an Informal Conference would be held on February 9, 1993, to obtain a preliminary statement as to all sides of the case.

On February 9, 1993, the Informal Conference was held with an Agent of the Board together with representatives of the Respondent and Union present.

When the Informal Conference failed to resolve the Charge, the Board issued the instant Complaint on March 4, 1993, wherein it alleged in Paragraph 3 of said Complaint that:

"3. On or about January 5, 1993, Edward A. Cotugno, an Agent for Barbara Leonard and the State of Rhode Island separated Darcey (sic) Viner from her employment with the State of Rhode Island - Office of The Secretary of State. Said action has been taken in retribution and retaliation of Ms. Viner's action of exercising the statutory rights provided via § 2-7-12 and § 36-11 and constitutes a violation of § 28-7-13 in that: 1. it evidences the agent's action relative to tracking activities of employees; 2. it evidences that agent's action of preparing a black list for the purpose of preventing such employees from retaining employment; 3. it evidences an attempt by the agent to interfere with the formation of an employee-labor association; 4. it evidences the agent's attempt to require, as a condition of employment, that employees refrain from joining and assisting the employee-labor association; 5. it is evidence of the agent's attempt to discourage membership in the employee-labor association; 8. it evidences the agent's action of discharging the employee because of action taken under this Chapter; 9. it evidences the agent's intention of preventing employees from retaining employment; 10. it establishes that the agent's action has interfered with, restrained and coerced employees in the exercise of rights guaranteed by § 28-7-12".²

"9. To distribute or circulate any black list of individuals exercising any right created or confirmed by this chapter or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment".

R.I.G.L. 28-7-13 (10) provides:

"10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12".

² The references to items 1, 2, 3, 4, 5, 8, 9 and 10 in the Complaint relate to subsections 1, 2, 3, 4, 5, 8, 9 and 10 of R.I.G.L. 28-7-13.

An Answer to the Complaint was filed by the Respondent on March 9, 1993, wherein it admitted the allegations of Paragraphs 1 and 2 of the Complaint and denied the allegations of Paragraphs 3 and 4 of the Complaint

A Formal Hearing in this matter took place on May 17, 1993, with representatives of the Respondent and the Union being present. At the conclusion of the Formal Hearing, the parties were given the opportunity to file written Briefs. The Brief of the Respondent was received by the Board on July 19, 1993, and that of the Union on July 20, 1993

In arriving at the Decision and Order herein, the Board has reviewed the testimony, the exhibits and the Briefs filed in this matter.

DISCUSSION

In order to arrive at its Decision and Order herein, it is essential to review in substantial detail the testimony and exhibits presented to the Board at the Formal Hearing on May 17 1993. As is, and will be, apparent much depends upon the credibility of the witnesses and the consistency of their testimony not only in relation to the overall facts but in relation to their own testimony.

We shall begin with a review of the essential testimony of Darcy Viner (hereinafter Viner).

Viner had been employed in the Office of The Secretary of State of the State of Rhode Island for five (5) years prior to being terminated from her position as "Systems Analyst" on January 5, 1993. (Tr. Pg. 39)⁴ She further testified that shortly following the state wide election on November 6, 1992, (Tr. Pgs. 46 and 47 she began an organizational campaign (Tr. Pg. 47 to

³ This witness is referred to as both Darcy Viner and Darcey Viner. The Board will adopt the name Darcy Viner, since it is spelled that way in various Board documents and in the transcript of the Formal Hearing on May 17, 1993.

⁴ References to Tr. is to the transcript of May 17, 1993, and Pg. refers to the pages of that transcript.

organize the employees of the Secretary of State's Office on behalf of the Union; that she was involved in such organizational campaign (Tr. Pg. 39); was aware of the organizational committee for said campaign (Tr. Pg. 39); that she scheduled meetings with the employees in the Secretary of State's Office in relation to the organizational campaign and attended such meetings (Tr. Pg. 44); that she solicited the attendance of her co-workers (Tr. Pgs. 44 and 45); that she made telephone calls to co-workers in support of the organizational campaign (Tr. Pg. 45); that she participated in the preparation of brochures and mailings in relation to said organizational campaign (Tr. Pg. 45) and in fact assisted in the distribution of such brochures and mailings (Tr. Pg. 45); that all of the foregoing Organizational Activities were done by her at work during her lunch time and breaks and at nights at the Union's office (Tr. Pg. 49) and that none of it was done on State time (Tr Pg. 49)

With respect to her work performance for the five (5) years in the Office of The Secretary of State, she testified, without contradiction, that she had never refused a direct order of a superior (Tr. Pg. 40); that she had never been informed that she was derelict in her duties (Tr. Pg. 40); that she had not failed to perform her duties as Systems Analyst (Tr. Pg. 40)

At the General Election of November 6, 1992, Barbara Leonard (hereinafter Leonard) defeated the then incumbent Kathleen Connell. Following her election as the new Secretary of State, Leonard formed a Transition Team to work with the outgoing Secretary of State and her staff. One of the members of that Transition Team was Edward Cotugno (Tr. Pg. 5) (hereinafter Cotugno) whose position at the date of the Formal Hearing on May 17, 1993, was that of "Administrative Assistant of Policy and Programs, Deputy Chief of Director" (Tr. Pg. 4). Cotugno commenced his official duties on January 5, 1993, the date that Leonard was sworn in as Secretary of State (Tr. Pg. 5), having served prior thereto on the Transition Team (Tr. Pg. 5). During the transition period and up to January 5, 1993, neither Cotugno nor any member of the Transition Team

informed Viner of their alleged concerns relative to the computer operations, for which Viner was directly responsible (Tr. Pg. 41)⁵ nor did anyone ever inquire of her concerning alleged complaints about the computer operations (Tr. Pg. 41). She further testified that neither Cotugno nor any member of the Transition Team, prior to January 5, 1993, the date of her termination of employment, requested that she, Viner, meet with the Transition Team or any part thereof relative to her duties (Tr. Pg. 41) but did receive a request from the then Chief of Staff, Robert Donley, that she prepare a written job description of her position and that she did so and personally delivered it to Cotugno and Leonard prior to January 5, 1993, (Tr. Pgs. 41 and 42 - See also Union Exhibit 1 entitled "POSITION - SYSTEMS ANALYST"). Viner further testified that the only time she had met Cotugno prior to January 5, 1993 was at a reception, in late December of 1992 or in early January 1993, that was held in honor of the new Secretary of State (Tr. Pgs. 40 and

Viner testified that in the afternoon of January 5, 1993, after Leonard had been sworn in as the new Secretary of State, she was visited by Cotugno⁶ at her office at North Main Street,

⁵ As will be set forth and discussed hereinafter, are the alleged failings of Viner in regard to the performance of her duties as Systems Analyst.

⁶ No superior in the Secretary of State's Office had made an appointment with Viner for Cotugno. His arrival was wholly unannounced.

Providence, Rhode Island. He handed her a letter⁷ and according to Viner (which was denied by Cotugno) said that "It was his dubious honor to deliver the letter of termination effective immediately." (Tr. Pgs. 43 and 44) and that she was not to be allowed in the office alone unless escorted by someone (Tr. Pg. 44) and that should call the office to make an appointment to remove personal effects (Tr. Pg. 44).

Mr. Robert Donley⁸ (hereinafter Donley) Chief of Staff under Kathleen Connell, the prior Secretary of State, testified that he had served in the capacity as Chief of Staff on an acting basis from April of 1989 to July of 1989 when he was made Chief of Staff (Tr. Pg. 51) and that prior thereto, he had served as Second Deputy Secretary of State, Director of Policy (Tr. Pgs. 52 and 52); that toward the end of November 1992 (after his return from a vacation in Florida following the November 6, 1992, elections) he learned of a Union organizing campaign for employees in the Office of The Secretary of State (Tr. Pg. 52) but took no part therein (Tr. Pgs 64 and 65); that after his return from Florida, he learned Leonard had a Transition Team and he began having business meetings

⁷ "January 5, 1993

Mrs. Darcey Viner
Systems Analyst
Secretary of State
Room 218
State House
Providence, RI 02903

Dear Mrs. Viner:

Please be advised due to budgetary reasons and pending reorganization of the MIS division of the Secretary of State's office, it has hereby been established that the position of Systems Analyst will be abolished effective immediately.

Sincerely

(s) Edward A. Cotugno

Edward A. Cotugno
Director of Administration
Deputy Secretary"

⁸ Donley's last name has been referred to as Donnelly. However, it would seem from all of the records that his last name is Donley.

with the Transition Team (Tr. Pg. 52). He confirmed Viner's testimony that neither Leonard nor any member of her Transition Team requested a meeting with Viner (Tr. Pg. 52). Donley further testified that a couple of days after he left the administration (i.e. January 5, 1993 he had a meeting with Cotugno (Tr. Pg. 53 concerning a package that had been sent and addressed to him at the Secretary of State's Office which had been opened without his consent (Tr. Pgs. 53 and 54 and that he went to see Cotugno .because I was infuriated about my mail being opened" (Tr. Pg. 55).

Donley testified that at this meeting of early January 1993, Cotugno told Donley that the "Union is going down" (Tr. Pg. 57); that "he had the votes" (Tr. Pg. 57 and knew that because there were a couple of members on staff who were giving him information and that "...he, Cotugno, knew more than we thought he knew" (Tr. Pgs. 57 and 58); that he, Cotugno knew that Donley wasn't involved but that "...it's Viner and his wife" (Tr. Pgs. 58 and 63)⁹ Donley also testified that Cotugno told him that he had been conversing with staff members relative to the Union's organizational campaign (Tr. Pg. 62) and that he knew what was going on at Union meetings (Tr. Pg. 63). Donley also made it clear in his meeting with Cotugno that he had heard that Cotugno had been telling employees of the Secretary of State's Office, that Donley had prepared a list of employees (so-called hit list) who he, Donley, felt were not doing their job (Tr. Pg. 57). Other testimony established that the only list ever delivered by Donley to Cotugno was a listing of employees who held their positions by certain state statutes and had no relation to the qualifications of such employees. These lists will be discussed hereinafter

Mr. Cotugno testified that he was a member of the Transition Team (Tr. Pg. 5) and that during the period up to January 5, 1993, while he was on the Transition Team that he learned of the Union's

⁹ The reference to Viner relates to Darcy Viner's husband, Spencer Viner, who during the administration of the prior Secretary of State (Kathleen Connell) was Legal Counsel for the Secretary of State.

organizational campaign from newspaper articles (Tr. Pg. 51); that during the transition period there were no staff meetings relative to the Union's organizational campaign (Tr. Pg. 5)

In relation to the part he played in the termination of Viner, he testified that he signed the termination notice (Tr. Pg. 6). He then testified that it wasn't a termination but that "it was an abolishment of a position that was decided throughout the transition" (Tr. Pg. 6, Lines 11 and 12). He then testified that "She was one of several positions that were either abolished shortly on the 4 or the 5, I'm not sure what day it was in January I believe is was -- there were seven positions terminated the first day of office. It would have been more -- I believe it was at least seven -- and she (sic) was one of the positions that were abolished on that day" (Tr. Pg. 6, Lines 15-21). When asked who made the decision to abolish Viner's position, it took from Page 6 to Page 9 of the transcript for Mr. Cotugno to finally answer in response to the question: "Q. Do you recall who recommended the abolishment of Ms. Viner's position? A. No, I don't." The termination letter was signed by Cotugno (See State Exhibit 1 and does say that: "...due to budgetary reasons and pending reorganization of the MIS division of the Secretary of State's office, it has hereby been established that the position of Systems Analyst will be abolished effective immediately"

Cotugno testified that Viner's position was eliminated to save some money (Tr. Pg. 7, Lines 3 and 4); that six (6) other positions were eliminated to save money (Tr. Pg. 6). He later testified that the position of Chief of Staff, occupied by Donley, had been filled (Tr. Pg. 23); he also testified that the Legal Counsel position occupied by Spencer Viner had been broken down into two (2) positions and had been filled (Tr. Pg. 22). Again, at Page 22 of the transcript, Cotugno testified that the Public Information Office position which had been eliminated had been reassigned as "Director of Elections" and that "...the other positions that were filled were more or less of the clerical nature, not including my position as Deputy Chief of Staff, and Chief of Staff position of

that nature;..." Cotugno further testified that some of the duties performed by Viner, prior to her termination, were being performed by a new employee, Don Barkley, (Tr. Pg. 24 who was performing the duties formerly performed by Viner and a Carol Zorabedian (Tr. Pg. 69). He also testified that since the seven (7) or so employees that were either terminated or had their positions abolished as of January 5, 1993, twelve (12) new employees had been hired (Tr. Pg. 27, Lines 14-17

With respect to his (Cotugno's) knowledge as to the Union organizational campaign, he testified that prior to the Union election which took place after January 5, 1993, he had no discussions with any of the employees of the Office of The Secretary of State in relation to Union matters (Tr. Pg. 27) and that he never discussed Union matters with employees of the Office of The Secretary of State (Tr. Pg. 28).

As to the complaints about the operation of the Secretary of State's Office, he testified that complaints were made in relation to: 1. The Corporate Division (Tr. Pg. 28); 2. The Computer Systems not running up to speed (Tr. Pg. 28) and that it was the opinion of people who used the system that they had to wait too long for documents (Tr. Pg. 28). According to Cotugno, the complaints were in relation to "...the general operations of that area of the Systems Analyst and the System Operation area (Tr. Pg. 30). According to Cotugno's testimony, the problem was that only one (1) person was available who knew the operation of the system and that person was Viner (Tr. Pgs. 30 and 31). It is clear from the testimony and record that he, Cotugno, never spoke to Viner about these complaints nor did he discuss these complaints with the prior Secretary of State's staff (Tr. Pg. 31) but that he did discuss the problems with the vendor of the computer system (Wang Industries). See transcript Pages 31-37. In the opinion of the Wang representative, the system was adequate to provide the necessary information but that it (the system) was underutilized (Tr. Pgs. 32 and 33); that Wang could take over at an approximate cost of \$8800 per year (Tr. Pg. 36 See also State Exhibit 1,

Letter from Wang to Secretary-Elect Barbara Leonard dated January 4, 1993.¹⁰

As to meetings with Viner during the so-called transition period, it is clear that no such meetings took place. At first Cotugno testified that he had no meeting with Viner "...because she refused to show up and discuss her position with anyone on the Transition Team" (Tr. Pg. 7, Lines 6 and 7 At Page 10 of the transcript he testified that:

"...I was led to believe that originally they were all going to meet, then that was cancelled...; things got a little bogged down in the transition and I believe all we did receive from any of the employees, with the exception of a few, was job specs written by themselves and submitted to us. So that's all we really had to go by".

As to Viner meeting with the Transition Team, at Page 10 of the transcript he said:

"I believe that she was told not to meet with us. I'm not positive". (Lines 20 and 21 of Transcript, Page 10).

As to Viner's work performance, Cotugno said that prior to January 5, 1993, "...I have no knowledge what she did. No Clue".

As to his first meeting with Viner, Cotugno testified that he did not know her prior to January 5, 1993, (Tr. Pg. 12, Lines 12 and 13). He then testified that he had met her once prior to January 5, 1993, at a staff party where she introduced herself (Tr. Pg. 12, Lines 20 and 21). He then proceeded to say that it was not a staff party but at a staff meeting (Tr. Pg. 13, Line 3

As to his meeting with Viner on January 5, 1993, he testified that he went to Viner's office on North Main Street and delivered her termination notice to her personally and asked her to take her effects, and someone helped her move her stuff out of the office that was it (Tr. Pg. 14 He denied saying that "I have the

¹⁰ The services to be provided were not spelled out in detail but the letter did give examples of the work. In addition, the letter stated: "We recommend that consulting for the design, development, testing, implementation, training and documentation of these applications be separate from this special one-time offer".

dubious honor of terminating your services" (Tr. Pg. 14, Line 19)

As to Viner's part in the Union's Organizational Campaign, Cotugno testified that prior to January 5, 1993, he had knowledge relative to Viner's actions on behalf of the Union (Pg. 16). When asked if he became aware that Viner was an active member of the Union organizing campaign committee, he said at Pages 16 and 17 of the transcript:

"...As far as who was an organizer or who wanted to be a member, I'm not sure who was what. The only time I noticed that Mrs. Viner was still involved with the Union actually was when they were picking a supervisor for the Union election and she was picked". (Underlining added)

When he, Cotugno, learned that Viner would be the observer for the Union at an election to determine if the Union or no Union would be chosen for employees in the Secretary of State's Office, he objected to Viner acting in that capacity because she was a disgruntled employee (Tr. Pg. 18). He denied objecting to Viner because she had been a Union organizer (Tr. Pg. 18).

There was conflicting testimony concerning certain lists that were either written or oral and allegedly given by Donley to Cotugno. According to Cotugno, Donley had given him a list of several employees whom Donley felt did not have protected status and whom in any event should be let go because they were satisfactory employees. Donley denied ever giving any such list or commenting upon employees who had not done their jobs and should therefore be terminated. At the conclusion of the Hearing, the Union and the Respondent were given opportunity to submit to the Board any such list. On May 26, 1993, Cotugno, by letter, notified the Board that after searching his records:

"I can find no written statement from Mr. Donley regarding employees whom he felt should be terminated when Mrs. Leonard took office as Secretary of State....

I would be willing to submit to a polygraph test to verify my statement regarding Mr. Donley and his statements to me regarding the termination of certain employees".

Following the Hearing on May 17, 1993, the Board received copies of two (2) letters sent by Donley to Cotugno dated December 30, 1992, and January 4, 1993, respectively. The December 30, 1992, letter listed for Cotugno the Deputy Secretaries of State and acting Deputy Secretaries of State with no comments about their job performance. The letter of January 4, 1993, related to the position of Assistant Deputy Secretary of State and Donley informed Cotugno that no one occupied that position. Further, there was no reference in this letter to the job performance of any employee.

As can be seen by the foregoing synopsis of the testimony in this matter, much is in conflict. It is the Board's responsibility to determine and make Findings of Fact based upon a resolution of the conflicting testimony. To do this the Board must

1. Weigh the testimony of each witness, taking into consideration not only the objectivity of the witness's testimony but its overall internal consistency;

2. The plausibility of the witness's testimony and

3. The demeanor of the witness.

4. The Interest of the witness in the pending matter;

5. The PERCEPTION of the witnesses concerning what he or she has seen or heard;¹¹

6. The memory of the events;¹²

7. First-hand knowledge of the events;¹³

With the above factors in mind, the Board will weigh the evidence in this case.

Viner was a five (5) year employee in the Office of The Secretary of State and held the position of Systems Analyst.

¹¹ Frequently, the initial observation is faulty or incomplete because the observer has no prior knowledge that a dispute will develop concerning what he or she has seen or heard and his or her casual sensory impression is not sharp and keen.

¹² Remembrance of events weeks, months and years later is frequently dim and inaccurate. By lapse of time, the precise details may elude the witness's memory.

¹³ Clearly, the testimony of first-hand knowledge is more apt to be precise than knowledge gained from second-hand sources.

During her employment prior to January 5, 1993, she carried out duties as Systems Analyst without complaint from her supervisor former Secretary of State, Kathleen Connell, nor was there record of failure to perform her duties in satisfactory fashion. Following the General Election of November 6, 1993, when Leonard defeated Connell, Viner began an active campaign on behalf of the Union to organize the employees in the Secretary of State's Office. There was no dispute that she was the motivating factor in the organizational campaign. While the Respondent, through Cotugno, sought to persuade the Board that neither Leonard nor he nor Transition Team had any knowledge of the fact that Viner was active in the organizational campaign, his statement that "The only time I noticed that Mrs. Viner was still involved with the Union actively was when they were picking a supervisor for the Union election and she was picked". (Underlining added), clearly, was an admission that he had prior knowledge of her participation in Union's Organizational Campaign. In addition, this Board is well aware of the widespread newspaper coverage that was given to the Union's Organizational Campaign. Further, Cotugno testified that the Transition Team had been warned by legal counsel to avoid entanglement in the Union's campaign. Weighing all of Cotugno's testimony, the Board concludes that Cotugno, at least, knew prior to January 5, 1993, that Viner was active in the Union's Organizational Campaign. It is not credible of belief that he did not report such activity to the Transition Team and to Leonard. As will be noted hereinafter, he was aware through members on the Secretary of State's staff that the organizational campaign was proceeding.

The Respondent sought to persuade the Board that Viner was terminated because her position of Systems Analyst was being abolished and that the elimination of such position would save money and that she was not terminated because of her Union activities. What is the truth of the matter? While Viner was compensated (including all benefits) about \$42,000.00 per year, the Wang Agreement would cost \$8,800.00 plus other amounts for

consulting for design, development, testing, implementation, training and documentation of these applications" (State Exhibit 1). What that would or did cost was never revealed. In addition, Cotugno testified that following Viner's termination the Secretary of State's Office had hired twelve (12) or so new employees including a new Chief of Staff, two (2) new Legal Counsels, an Administrative Aid, a Deputy Chief of Staff, and two (2) new Secretaries. Further, a Mr. Don Barkley was hired at an annual salary of \$23,000.00 and performed some of the work previously performed by Viner. A review of all of the testimony in relation to cost savings being the basis for Viner's termination (or the elimination of her position) leads the Board to the conclusion that "cost savings" was not the true basis for Viner's termination or the transparent act of eliminating her position of Systems Analyst

Another basis, at least inferentially raised, to justify Viner's termination was her alleged inefficiency and not using the computer system to its full utilization capacity and complaints received relative to the time it took to get information and the accuracy of information obtained. Assuming that Viner had all of the faults alleged and that the multitude of complaints were legitimate, why wasn't all of this brought to Viner's attention or even to the attention of Viner's superior? If such inefficiency existed, it is beyond the Board's comprehension why some action wasn't taken. The fact is that no action was taken by anyone other than to see if Wang could service the computer program.¹⁴

A review of all the testimony in relation to the inadequacy of Viner, her lack of full utilization of the computer system, leads the Board to the conclusion that the alleged inefficiency of Viner, lack of full utilization of the computer system and the alleged myriad of complaints were not the true basis for Viner's termination or the transparent act of eliminating her position of Systems Analyst.

¹⁴ It is of more than passing interest to note that Wang's proposal (State Exhibit 1) is dated January 4, 1993, one (1) day prior to Viner's termination. It appears to the Board that this letter was a backdrop to support the elimination of Viner's position and her termination of employment.

The testimony relied upon by the Respondent to negate Union's claim that Viner was terminated for her activities on behalf of the Union came from Cotugno. In listening to reviewing his testimony there were numerous inconsistencies and outright contradictions such as:

1. His initial testimony that he signed the termination notice and then corrected this by saying it was not a termination but an abolishment of Viner's position;

2. While having signed Viner's termination letter of January 5, 1993, he testified that he didn't know who authorized it (Tr. Pg. 9);

3. His initial testimony was that Viner's position was eliminated to save money and then proceeded to testify as to the twelve (12) or so new employees hired;

4. His initial testimony that Viner had refused to meet with the Transition Team. This was later corrected when he said "I believe that she was told not to meet with us, I'm not positive";

5. His initial statement that he had never met Viner prior to January 5 1993, and his subsequent correction to say, he had met her at a staff party prior to January 5, 1993, and then corrected such statement to say "Staff meeting" (Tr. Pgs. 12 and 13

6. His initial statement that Viner had not cooperated with a report of her duties and the subsequent admission that Viner did deliver a written document listing her duties (Union Exhibit 1).

Without unduly lengthening this Decision, the Board will not list other inaccuracies but does conclude that Cotugno's testimony is to be scrutinized carefully. Overall, it was and is the Board's impression that Cotugno was testifying "close to the vest", and putting his best foot forward to make it appear that Viner was not terminated or her position abolished for her Union activities but for other legitimate reasons. While it is always difficult in cases such as this to sift the wheat from the chaff, it is the Board's conclusion that Viner was in fact terminated from her employment because of her Union activities.

Board notes the line of National Labor Relations Board cases which set a standard for determining causation in cases alleging unlawful discrimination, as here, and as set forth by the Respondent in its Brief at Pages 7 and 8. In this case, the Board finds that

1. Protected activity existed in this case;
2. The Respondent knew of Viner's activities on behalf of the Union; and
3. Union animus did exist.

In dealing with Union animus, it is not required that words showing animus be established. A course of conduct is often sufficient. The testimony of Donley, which the Board credits, that Cotugno said at the meeting between Donley and Cotugno on or about January 7, 1993, that "...the Union is going down", "...he had the votes" and that "...there were a couple of members on staff, and that's where he [Cotugno] was getting his information and that he [Cotugno] knew more than we thought he knew" and when asked about the campaign, he, Cotugno, said "its Viner and his wife", clearly to the Board established animosity. It certainly can't be said that Cotugno, by his comments, was approving the Union organization of the employees of the Office of the Secretary of State. It is clear that his desires where otherwise

Further, the Board concludes that the alleged reasons given for Viner's termination do not and did not overcome the Union's case.

all of the foregoing, the Board finds that Viner was terminated for her activities on behalf of the Union in violation of R.I.G.L. 28-7-13, (3), (5) and (10).

In order to remedy the violation herein, the Respondent will be ordered and directed to reinstate Viner in her previous position with full backpay and all benefits applicable to her position from the date of her termination (January 5, 1993 to the date of her reinstatement, without deducting from said backpay any earnings she may have received from other employment or any sums received as

unemployment compensation during the period January 5, 1993, to the date of reinstatement

FINDINGS OF FACT

1. The Board finds that Cotugno's testimony was inherently inconsistent on numerous issues, as hereinbefore set forth, and the Board declines to credit his testimony on such issues.

2. The Board finds the testimony of Viner and Donley credible and consistent and is accepted by the Board on those issues in conflict with the testimony of Cotugno.

3. Viner was employed in the Office of the Secretary of State for a period of five (5) years as a Systems Analyst prior to the termination of her employment on January 5, 1993.

4. No complaints about the performance of her duties as Systems Analyst were made until after she became active in the Union's campaign in November of 1992 to organize the employees of the Office of the Secretary of State.

5. Viner was the prime mover in the Union's organizational campaign and was fully active in contacting employees in the Secretary of State's Office by mailing, telephone calls, brochures and personal contacts with them at the Secretary of State's Office and in urging the employees to support the Union and to vote for the Union at the time of an election to determine whether the Union or no Union would represent the employees.

6. Viner's activities on behalf of the Union were known to Cotugno and through him by the Transition Team and Leonard

7. Viner's activities on behalf of the Union were widely reported in the newspapers and Cotugno was so informed

8. Cotugno's statement on or about January 7, 1993, to Donley that "Viner was still involved with the Union" clearly established his prior knowledge of Viner's activities on behalf of the Union.

9. The Respondent's termination of Viner and/or the elimination of her position was motivated by anti-union animus.

10. The alleged abolishment of Viner's position as Systems Analyst in order to save money was not supported by the evidence.

The hiring of twelve (12) or more new employees in the Office of the Secretary of State after Viner's termination on January 5, 1993, clearly contradicted the Respondent's claim that Viner's termination was a cost saving measure.

12. Viner's employment was not terminated as a cost savings measure

13. Alleged complaints relative to the failings of the computer system were never revealed to Viner.

Viner's alleged failure to utilize the computer system to its maximum extent were never revealed to Viner

The alleged complaints referred to in Findings of Fact 13 and 14 were not the basis upon which Viner was terminated.

The Board finds that Viner was terminated and/or her position of Systems Analyst was abolished because of her activities on behalf of the Union.

CONCLUSIONS OF LAW

1. The Union has proven by a fair preponderance of the credible evidence that the Respondent terminated Viner because of her activities on behalf of the Union and that such action was in violation of R.I.G.L. 28-7-13 (3), (5) and (10)

2. The Union has proven by a fair preponderance of the credible evidence that Viner's position of Systems Analyst was abolished because of her activities on behalf of the Union in violation of R.I.G.L. 28-7-13 (3 (5) and 10).

3. The Union has proven by a fair preponderance of the credible evidence that "Union animus" was the basis for the termination of Viner and/or the elimination of her position of Systems Analyst in violation of R.I.G.L. 28-7-13 (3 (5) and 10).

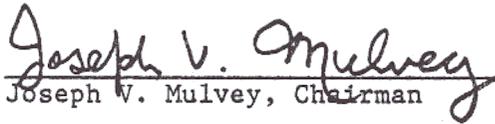
ORDER

1. The Respondent shall within thirty (30) days of the date hereof reinstate Viner in her position of Systems Analyst within the Office of the Secretary of State of the State of Rhode Island

with full backpay and all benefits retroactive to the date of her termination on January 5, 1993.

2. There shall be no deduction from the backpay due any sum earned by Viner during the period from January 5, 1993, to the date of her reinstatement nor shall there be any deduction made from said backpay any unemployment benefits which she may have received during the period January 5, 1993, to the date of her reinstatement

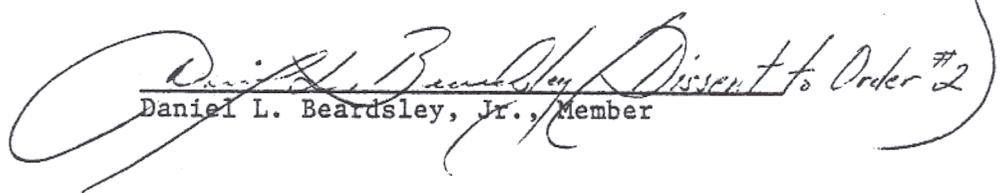
RHODE ISLAND STATE LABOR RELATIONS BOARD


Joseph V. Mulvey, Chairman


Raymond Petrarca, Member

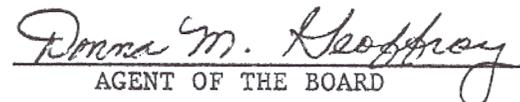

Frank Montanaro, Member


Glenn Edgecomb, Member


Daniel L. Beardsley, Jr., Member

Entered as Order of the
Rhode Island State Labor
Relations Board

DATED: February 18, 1994

BY: 
AGENT OF THE BOARD